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Hazing Laws in Louisiana: Criminal Penalty Masquerading Under the Guise of Punitive Damages

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HAZING LAWS IN LOUISIANA: CRIMINAL PENALTY MASQUERADING UNDER THE GUISE OF PUNITIVE DAMAGES?

Brittney Esie*

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I. INTRODUCTION

Louisiana's curious history with punitive damages can be seen in the jurisprudence of cases argued since 1836. Louisiana jurisprudence was rooted in a French civil law tradition, which originally shied away from awarding punitive damages to victims who suffered wrongs. Unlike fundamental civil law jurisdictions, Louisiana is a mixed jurisdiction, which borrows heavily from common law tradition. Under common law, the idea of punitive damages is wholly embraced. In order to bridge the disconnect between the two competing traditions, civil and common law,

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Louisiana—in keeping with civil law traditions—“refuses to allow punitive damages except where authorized by statute.”¹

In 2018, the Louisiana Legislature passed several acts, one of which was Act 481, also known as Senate Bill 91.² Senate Bill 91 enacted Louisiana Civil Code article 2315.10, which allows a person to collect excessive penalty payments in civil lawsuits after someone dies from hazing.³ Another act that passed in 2018 by the Louisiana Legislature is Act 635, known as House Bill 78.⁴ House Bill 78 amends and enacts penalties relative to the crime of hazing.⁵ Senate Bill 91 and House Bill 78 were both inspired and proposed due to the unfortunate death of Louisiana State University (LSU) freshman, Max Gruver, who died after a night of heavy drinking while pledging the Phi Delta Fraternity.⁶

Fraternities and sororities are college or university student organizations formed to promote common social and intellectual interests. They are also called Greek letter social

1. John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579 (2010).

2. 2018 La. Acts No. 481. *See also* Wilborn P. Nobles, III, *John Bel Edwards signs bill to make hazing a felony act*, THE TIMES-PICAYUNE, <https://perma.cc/A68V-TN32>.

3. LA. CIV. CODE ANN. Art. 2315.10. Liability for death caused by hazing; additional damages. In addition to general and special damages, exemplary damages may be awarded upon proof that the death on which the action is based was caused by a wanton and reckless disregard for the rights and safety of the victim through an act of hazing, as defined by R.S. 17:1801, regardless of whether the defendant was prosecuted for his acts. Acts 2018, No. 481, §1, eff. May 25, 2018.

4. 2018 La. Acts No. 481. *See also* Leigh Guidry, *Here's what you need to know about a new hazing law in Louisiana*, LOUISIANA DAILY ADVERTISER, <https://perma.cc/QX5T-W4AH>.

5. According to LA. REV. STAT. ANN. § 14:40.8(C)(2)(a) (2018), hazing is defined as:

‘Hazing’ is any intentional, knowing, or reckless act by a person acting alone or acting with others that is directed against another when both of the following apply: (i) The person knew or should have known that the act endangers the physical health or safety of the other person or causes severe emotional distress. (ii) The act was associated with pledging, being initiated into, affiliating with, participating in, holding office in, or maintaining membership in any organization.

6. Guidry, *supra* note 4.

organizations because most of them by tradition name themselves using two or three letters taken from the Greek alphabet.⁷

Fraternities have a long history of involvement in the practice of hazing going back to the 1800s.⁸ Socially, hazing is the practice of “initiating new members into a group, often through harassment and humiliation.”⁹ It is a bleak American tradition that has endured in the collegiate culture for decades.¹⁰ While the United States Congress has recognized the seriousness of hazing and has proposed federal anti-hazing legislation, none of these proposals have been successful, so states have proposed and passed anti-hazing laws.¹¹

The focus of this paper is to briefly explore the timeline that led to the Louisiana Legislature to enact Louisiana Revised Statutes 14:40.8. Then, the paper critiques and analyzes Senate Bill 91, specifically focusing on the reference in art. 2315.10 to the Louisiana Revised Statutes 17:1801, which prohibits hazing.¹² It will trace the history of Louisiana jurisprudence and try to understand the societal view that allowed the creation of the new civil code and the corresponding statute. This statute is important because it acts as a new means for victims to expose tortfeasors to punitive repercussions by opening up liability to the penalties outlined in Louisiana Revised Statutes 14:40.8.¹³ Therefore, this paper will analyze how the Louisiana Legislature uses such statutes to perpetuate civil fines.

II. BACKGROUND FRAMEWORK

In Louisiana, there are two forms of damages: compensatory and punitive.¹⁴ Compensatory damages operate to compensate victims

7. Devon M. Alvarez, *Death by Hazing: Should there be a Federal Law Against Fraternity and Sorority Hazing?*, 7 JOURNAL OF MULTIDISCIPLINARY RESEARCH 43, 46 (2015).

8. *Id.*

9. *Id.* at 43.

10. *Id.*

11. *Id.* at 44.

12. LA. REV. STAT. ANN. § 17:1801 (2018).

13. *Id.*

14. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 364 (1994).

for the loss endured due to the injury that was committed against them. Compensatory damages help make the tort victim “whole” again, meaning it is an amount of money designed to “place the plaintiff in the position she [or he] would have been in if the tort had never occurred.”¹⁵ On the other hand, punitive damages is the amount of money—in addition to compensatory damages—that is “designed to punish and deter the defendant and others like [him or] her.”¹⁶ In keeping with civil law tradition, Louisiana has continually advocated and applied a system for compensatory damages.¹⁷ Nevertheless, Louisiana operates under a mixed jurisdiction framework between civil and common law. The result of such framework makes it possible for Louisiana to grant punitive damages for civil liability.

Punitive damages, also referred to as exemplary damages, are used to award money to victims for reasons that go beyond simple compensation.¹⁸ Punitive damages have been a staple of the common law for over 200 years,¹⁹ but Louisiana’s Civil Code of 1808 did not include articles directly addressing or allowing punitive damages.²⁰ However, as early as 1836, the Louisiana Supreme Court approved a jury’s award of punitive damages, “[d]espite the lack of a specific statutory basis.”²¹ This trend of awarding punitive damages despite the lack of statutory authorization occurred at least ten times between the years 1836

15. Maraist, Church, Corbett, Galligan, Richard & Flannagan, *TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES*, 419 (3d ed., Vandepas 2017).

16. *Id.*

17. LA. CIV. CODE ANN. art. 2315(A) (2017): “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” This article provides the legal basis for civil liability for damages suffered due to another person’s actions.

18. James E. Bolin Jr., *Enter Exemplary Damages*, 32 LA. B.J. 216, 217 (1984). Louisiana statutes use the term “exemplary” rather than “punitive” damages. The two terms are used interchangeably, but they have different connotations. The term “punitive” emphasizes the goal of punishment, while the term “exemplary” emphasizes the goal of making an example of the wrongdoer for purposes of education and deterrence.

19. deGravelles & deGravelles, *supra* note 1, at 581.

20. *Id.* at 582.

21. *Id.* at 583.

and 1917.²² Over time, some courts felt the need to justify their decisions based on a statutory authorization for the award. The justification initially rested on Louisiana Civil Code article 1928 (now 2324.1), wherein states: “[I]n the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury.”²³ While the concept under modern civil law has been that punitive damages “violate the purpose behind the law of damages,” Louisiana courts have not been faithful to the idea that *all* damages should only be compensatory in nature.²⁴

III. HISTORICAL FRAMEWORK

The doctrine of punitive damages, also known as exemplary damages, “was first developed in the eighteenth-century common law of England,”²⁵ but punitive damages have an ancient origin.²⁶ Ancient Roman civil law,²⁷ the Twelve Tables of 450 B.C., and the Babylonian Code of Hammurabi,²⁸ which is about 4000 years old, calculated compensation in ways that included a punitive element.²⁹ The English common law punitive damages doctrine was carried over to the common law courts of the United States by 1784.³⁰

22. *Id.*

23. LA. CIV. CODE ANN. art. 1928 (1825) (now LA. CIV. CODE ANN. art. 2324.1 (2017)).

24. deGravelles & deGravelles, *supra* note 1, at 580.

25. C. Caldwell Herget Huckabay, *The Insurability of Punitive Damages in Louisiana*, 48 LA. L. REV. 1161, 1162 (1988).

26. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, WORKING PAPER SERIES (2003), <https://perma.cc/NKJ5-FTMN>.

27. Roman law acknowledged early on that a wrongdoer is liable to make payments to his or her victim for an amount beyond the actual harm incurred. The Twelve Tables of 450 B.C. provided multiple examples of damages, “in the form of fixed money payments, such as where a party failed to carry out a promise.” Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 CLEV. ST. L. REV. 251, 279 (2016).

28. In the Code of Hammurabi, multiple damages, which are synonymous with punitive damages, were “payable for offences, such as stealing cattle...or a common carrier failing to deliver goods.” Taliadoros, *supra* note 27, at 278.

29. deGravelles & deGravelles, *supra* note 1, at 580.

30. *Id.* at 582.

From its history of having been a French and Spanish colony, the territory that became the State of Louisiana ultimately retained the civil law, at least regarding the substance of its private law.³¹ The modern civil law view towards punitive damages is that it violates the purpose behind the law of damages, which is to repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer, the latter being the task of criminal law.³² Nevertheless, punitive damages became a widely accepted concept in America during the nineteenth century,³³ a practice that percolated in Louisiana in spite of its civil law heritage. References to punitive damages can be found in Louisiana as far back as the 1836 case of *Summers v. Baumgard*, which involved wrongful seizure.³⁴ In *Summers v. Baumgard*, the court stated that the defendant should be assessed punitive damages by reasoning:

The necessity of seizing the horse and dray in the first instance, in order to get possession of his truant apprentice boy, is not very obvious; but the detention of them after repeated demands, and the offer on the part of the plaintiff to give him ample security to make good any damage for which he might be justly liable, evince such an obstinate determination on the part of the defendant to take justice into his own hands, as fully authorized the jury to make him pay something in the shape of smart money.³⁵

The jurisprudential trend of awarding punitive damages in Louisiana continued in the 1887 case of *Dirmeyer v. O'Hern*. In this case, the jury awarded the plaintiff \$500, a sum in excess of the

31. For a full discussion, see JOHN W. CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866), 53-58 (Talbot 2015); Donald C. Massey & Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 LA. L. REV. 743, 769 (1996).

32. Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 744 (2008); deGravelles & deGravelles, *supra* note 1, at 580.

33. deGravelles & deGravelles, *supra* note 1, at 582.

34. Huckabay, *supra* note 25, at 1162.

35. Punitive damages are sometimes referred to as “smart money.” See *Summers v. Baumgard*, 9 La. 161, 162 (1836); see also Huckabay, *supra* note 25, at 1162.

compensatory damages the plaintiff sustained.³⁶ The Louisiana Supreme Court articulated that “these additional damages, thus found, are likewise called vindictive damages, which a judge or jury may inflict under a just sense of indignation for the wrong done”³⁷

However, in 1917 the Louisiana Supreme Court refused to award punitive damages in the case of *Vincent v. Morgan’s L. & T. R. & S. S. Co.*³⁸ The case centered around the killing of the plaintiffs’ child by a railroad employee. In their reasoning, the court stated:

Our conclusion therefore is that under our law as it now stands the right of action for the recovery of damages for personal injury, sustained through the fault of another, is personal to the injured party . . . but that neither the person originally injured nor those who succeed to his right with respect thereto, and who acquire rights of their own with respect to the injury inflicted upon them by his death, are entitled to recover anything more in the way of damages than adequate indemnity for the injury and loss inflicted upon him³⁹

Almost 100 years later, from the 1836 case of *Summers v. Baumgard*, the Louisiana Supreme Court succinctly articulated the state’s position regarding punitive damages in the 1932 case of *McCoy v. Arkansas Natural Gas Co.* In the *McCoy* case, the court stated that “[t]here is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty.”⁴⁰ This statement represents the current position of Louisiana state law.

36. *Dirmeyer v. O’Hern*, 39 La. Ann. 961, 3 So. 132, 133 (1887).

37. *Id.* at 134.

38. *Vincent v. Morgan’s L. & T. R. & S. S. Co.*, 140 La. 1027, 74 So. 541 (1917).

39. *Id.* at 549.

40. *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 497; 143 So. 383, 385-86 (1932).

IV. PUNITIVE DAMAGES, A SOCIETAL VIEW

Today, there is a wide array of statutes awarding punitive damages in Louisiana courts for a variety of circumstances.⁴¹ Newly enacted into this array of statutes is Louisiana Civil Code article 2315.10.⁴² As previously mentioned, punitive damages are used to award money to victims for reasons that go beyond simple compensatory damages.⁴³ Punitive damages are used to punish and deter the defendant.⁴⁴ Specifically, in *Mosing v. Domas*, the Louisiana Supreme Court articulated the purpose of punitive damages as, “punishing the defendant, of teaching the defendant not to do [the reprehensible bad act] again, and of deterring others from following the defendant’s example.”⁴⁵ However, while deterrence was originally a major goal of the statutory establishment of punitive damages in Louisiana civil law, deterrence has given way to punishment being the driving force of effectuating punitive damages.

41. See, e.g., LA. CIV. CODE ANN. art. 2315.3 (2017) (allowing punitive damages upon proof that injuries were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles); LA. CIV. CODE ANN. art. 2315.4 (2017) (allowing punitive damages upon proof that injuries were caused by a wanton and reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries); LA. CIV. CODE ANN. art. 2315.7 (2017) (allowing exemplary damages for criminal sexual activity upon proof that the injuries were caused by a wanton and reckless disregard for the rights and safety of the person when the victim was seventeen years old or younger); LA. REV. STAT. ANN. § 9:2800.76 (2017) (specifically allowing exemplary damages upon proof that the sale or distribution of an illegal controlled substance or participation in the marketing of an illegal controlled substance was in wanton or reckless disregard for the health and safety of others); LA. REV. STAT. ANN. § 22:1811 (2017) (allowing for an eight percent interest penalty on the amount due under a life insurance policy if not paid within 60 days after proof of death is rendered); LA. REV. STAT. ANN. § 22:1973(C) (2017) (allowing punitive damages against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars); LA. REV. STAT. ANN. § 51:1409 (2017) (allowing for punitive damages in the amount of three times the actual damages sustained in the event that a person suffers a loss of money or movable property if the court finds an unfair or deceptive method, act, or practice was knowingly used, by a person after being put on notice by the attorney general).

42. LA. CIV. CODE ANN. Art. 2315.10, *supra* note 3.

43. Bolin Jr. *supra* note 18.

44. deGravelles & deGravelles, *supra* note 1, at 588.

45. *Mosing v. Domas*, 830 So. 2d 967, 978 (La. 2002).

For years, the private law has been unable to sufficiently deter reprehensible behavior. Consider the underlying facts in *Mosing v. Domas*; this was a personal injury case about a man who was seriously injured when he was struck by a drunk driver. The defendant drunk driver had previously been cited for multiple Driving While Intoxicated (DWI) violations in the past and at the time of the incident with the plaintiff, the defendant was fleeing from an earlier hit and run accident that he had caused. Furthermore, several previous incidents showed not only the defendant's recidivism, but also his total lack of remorse.⁴⁶ The court in *Mosing* discussed multiple factors that drive the amount of punitive damages awarded against a defendant. Some of the factors included: the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a pattern, whether the defendant behaved recklessly or maliciously, and even the wealth of the defendant.⁴⁷ Some of these factors enter the exclusive realm of punishment rather than deterrence; for example: "[W]hether the misconduct was an individual instance or part of a pattern."⁴⁸ As noted, the defendant in *Mosing*, had several prior DWI infractions. None of the prior penalties given to him effectively deterred his behavior.⁴⁹ If the defendant cannot reasonably be deterred by reasonable punishment, then what can be done about the tortfeasor? Have Louisiana courts effectively

46. In this case, the defendant was ordered to pay \$500,000 in exemplary damages. On subsequent appeal, the Supreme Court of Louisiana held that "the jury did not abuse its discretion in awarding the plaintiffs \$500,000.00 in exemplary damages." *Id.* at 970.

47. *Id.* at 974.

48. *Id.*

49. *Id.* at 980:

On April 6, 1989, Domas was ticketed for operating a vehicle while intoxicated On May 1, 1990, a few weeks later . . . Deputy Menard, [] arrested him for operating a vehicle while intoxicated, second offense, and driving under a suspended license July 29, 1990, Domas was arrested again, this time for operating a motor vehicle in the City of Lafayette with an open container of alcoholic beverage in the vehicle. On August 22, 1990, less than two weeks prior to the incident giving rise to this litigation, Domas appeared in court and pleaded guilty to second offense DWI.

chosen to simply punish the tortfeasor by an award of damages excessively exceeding compensation, imposing a sort of civil fine, convinced that reasonable punishment by criminal courts offers insufficient deterrence? Are these civil fines simply criminal penalties masquerading under the guise of punitive damages for which quasi-criminal conduct can be sufficiently punished?

V. POTENTIAL PROBLEMS WITH PUNITIVE DAMAGES

Consider the recently enacted Senate Bill 91.⁵⁰ Senate Bill 91 creates potential problems with the enactment of Louisiana Civil Code art. 2315.10. Under civil law, a person can be sued for damages in a civil court in ordinary civil actions. The burden of proof in such civil cases is that the plaintiff must establish their case by a *preponderance of the evidence*,⁵¹ which means that the fact sought to be proved is *more probable than not*.⁵² However, the law distinguishes between two degrees of proof. In civil cases, the proof is by a preponderance of the evidence. The more probable than not standard requires only a determination that can be met with a simple probability that the fact in question is at least over 50% true.⁵³ In criminal court, the degree of proof is understandably greater.

The degree of proof in criminal court is called “proof beyond a reasonable doubt.”⁵⁴ It is the heaviest burden of persuasion. Under this standard of proof, guilt must be “so highly probable as to banish *all* reasonable doubts.” Therefore, the evidence must eliminate any doubt based upon fair reason.⁵⁵ The consequence of this standard of proof is that the trier of fact should believe that the defendant’s guilt is almost certain. So how does this relate to Senate Bill 91?

50. La. Acts No. 481, *supra* note 4.

51. Joe W. Sanders, *The Anatomy of Proof in Civil Actions*, 28 LA. L. REV. 297, 298 (1968).

52. *Id.*

53. *Id.* at 303-4.

54. *Id.*

55. *Id.* at 305.

As previously stated, Senate Bill 91 enacted Louisiana Civil Code art. 2315.10. This articles states that:

In addition to general and special damages, exemplary damages may be awarded upon proof that the death on which the action is based was caused by a wanton and reckless disregard for the rights and safety of the victim through an act of hazing, as defined by R.S. 17:1801, regardless of whether the defendant was prosecuted for his acts.⁵⁶

Violation of art. 2315.10 is a civil offense, therefore if a person has violated this article, they may be subject to a lawsuit in civil court and, as previously stated, the burden of proof in civil court is proof by a preponderance of the evidence, or more probable than not. Furthermore, since part of article 2315.10 depends on Louisiana Revised Statutes 17:1801, one must look to the definition of hazing as defined in 17:1801.⁵⁷ Moreover, under 17:1801 a person in violation of this statute “may also be subject to the provisions of R.S. 14:40.8 which provides penalties for certain hazing activities.”⁵⁸ Louisiana Revised Statutes 14:40.8 is a criminal statute, so violation of this statute would subject a person to punishment in criminal court and as previously stated the burden of proof in a criminal proceeding is proof beyond a reasonable doubt, or near certainty of guilt. Before further discussion into the problem with civil code article 2315.10, a conversation about how this statute potentially affects constitutional law is outlined below.

56. LA. CIV. CODE ANN. Art. 2315.10, *supra* note 3.

57. LA. REV. STAT. ANN. § 17:1801(D)(1)(a) (2018):

D. For purposes of this Section and R.S. 17:1801.1:

(1)(a) “Hazing” means any intentional, knowing, or reckless act by a person acting alone or acting with others that is directed against another when both of the following apply:

(i) The person knew or should have known that such an act endangers the physical health or safety of the other person or causes severe emotional distress.

(ii) The act was associated with pledging, being initiated into, affiliating with, participating in, holding office in, or maintaining membership in any organization.

58. LA. REV. STAT. ANN. § 17:1801(B) (2018).

VI. PUNITIVE DAMAGES AND THE EIGHTH AMENDMENT

In determining whether the Louisiana punitive damage codal provisions, such as art. 2315.10, are quasi-criminal in their effect, this section addresses two issues. First, this section provides an overview of the Eighth Amendment, specifically its prohibition of “excessive fines.”⁵⁹ Second, this section compares the Eighth Amendment issue with the present-day application and effects of certain punitive damage articles in Louisiana, specifically the recently enacted Senate Bill 91 and House Bill 78, which prohibits hazing to a new heightened level.

The Eighth Amendment states that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁰ Paying close attention to the bar against “excessive fines,” what constitutes excessive? In the context of civil fines, the Supreme Court in *Rex Trailer Co. v. United States* stated that if the goal is to punish the defendant, then a sanction that was intended as a civil remedy can be transformed into a criminal penalty, so that may constitute excessive.⁶¹ Yet, 33 years later in *Browning-Ferris Indus. v. Kelco Disposal*, the court stated, in a seven to two vote, that the Eighth Amendment’s prohibition against excessive fines “does not apply to awards of punitive damages in cases between private parties.”⁶² However, *Rex Trailer Co. v. United States* has never explicitly been overruled. So, where does that leave punitive damages today? Well, the issue may be complicated. Justice O’Connor notes in her *Browning-Ferris Indus. v. Kelco Disposal* dissent, of her concerns about the skyrocketing rate of punitive damages.⁶³ She states:

The Court holds today that the Excessive Fines Clause of the Eighth Amendment places no limits on the amount of

59. U.S. CONST. amend. VIII.

60. *Id.*

61. *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219 (1956).

62. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 109 S. Ct. 2909 (1989).

63. *Id.* at 2923.

punitive damages that can be awarded in a suit between private parties. That result is neither compelled by history nor supported by precedent, and I therefore respectfully dissent from Part II of the Court's opinion.⁶⁴

From a textualist standpoint, Justice O'Connor's concern is undoubtedly substantiated. The term "excessive fine" does not indicate any clear intent to preclude its application to punitive damages. Only through a lens of originalism and the Eighth Amendment's inextricable tie to criminal law does the court in *Browning-Ferris Indus. v. Kelco Disposal* come to its ultimate conclusion. Nevertheless, if *Rex Trailer Co. v. United States* is still "good law," then civil penalties made to punish the defendant can be, and maybe should be, treated as criminal penalties as to trigger the application of the Excessive Fines Clause of the Eighth Amendment.

Consider the recently enacted Senate Bill 91 and House Bill 78. Senate Bill 91 and House Bill 78 were passed by the Louisiana Legislature during the 2018 regular session. Senate Bill 91 enacted Louisiana Civil Code article 2315.10⁶⁵ and House Bill 78 amended Louisiana Revised Statutes 17:1801 and enacted Louisiana Revised Statutes 14:40.8.⁶⁶ Article 2315.10 makes reference to Louisiana Revised Statutes 17:1801, a civil statute that prohibits hazing in any form in any educational institution "supported wholly or in part by public funds"⁶⁷ and subjects those who violate the provisions of 17:1801 to the penalties for certain hazing activities outlined in Louisiana Revised Statutes 14:40.8, a criminal statute.⁶⁸ Interestingly enough, the language defining hazing and the activities that constitute hazing are almost identical in both statutes,⁶⁹ even though one

64. *Id.* at 2924.

65. La. Acts No. 481, *supra* note 4.

66. 2018 La. Acts No. 635.

67. LA. REV. STAT. ANN. § 17:1801(A) (2018).

68. *Id.* at § 17:1801(B).

69. Compare LA. REV. STAT. ANN. § 17:1801(D)(1)(b)(i) with LA. REV. STAT. ANN. § 14:40.8(C)(2)(b)(i):

LA. REV. STAT. ANN. § 17:1801(D)(1)(b)(i): 'Hazing' includes but is not limited to any of the following acts associated with pledging, being initiated into, affiliating with, participating in, holding office in, or

statute is under Title 17, which deals with education and the other statute is under Title 14, which governs criminal law. It is clear that violation of the criminal law under Title 14 automatically subjects one to punitive damages under Title 17 since the burden of proof in criminal cases is higher than civil cases. How would such a system work out in a real-world example?

VII. AN APPLICATION OF PUNITIVE DAMAGES

Given that the definitions of hazing are almost identical in nature,⁷⁰ violation of Title 14 hazing is likely to constitute a violation of Title 17 hazing, so one may be subject to punitive damages under Louisiana Civil Code article 2315.10. How would this system work out in a real-world hypothetical? Take for example student, 'Adam.'

Hypothesize that Adam is in violation of Louisiana Revised Statutes 14:40.8; this statute provides criminal penalties for the crime of hazing.⁷¹ Under this law, Adam may be subject to jail time but also to a fine of *up to* \$1000, and if the hazing resulted in the serious bodily injury or death of the victim, then the perpetrator would be subject to a fine of *up to* \$10,000 and imprisonment. Adam is prosecuted and convicted in criminal court, with a burden of proof that is beyond a reasonable doubt, of the crime of hazing and he is ordered to pay a fine of \$1000, but no jail time. Adam is now automatically subject to violation of Louisiana Revised Statutes 17:1801 and is subject to civil penalties, also known as punitive damages,

maintaining membership in any organization: (i) Physical brutality, such as whipping, beating, paddling, striking, branding, electric shocking, placing of a harmful substance on the body, or similar activity.

LA. REV. STAT. ANN. § 14:40.8(C)(2)(b)(i): 'Hazing' includes but is not limited to any of the following acts associated with pledging, being initiated into, affiliating with, participating in, holding office in, or maintaining membership in any organization: (i) Physical brutality, such as whipping, beating, paddling, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity.

Compare also LA. REV. STAT. ANN. § 17:1801(D)(1)(a), *supra* note 57 with LA. REV. STAT. ANN. § 14:40.8(C)(2)(a), *supra* note 5.

70. *Id.*

71. LA. REV. STAT. ANN. § 14:40.8 (2018).

that have no constitutional limit to their amount. How and why is this fair, especially given Louisiana's roots in French law, which originally shied away from punitive damages? If criminal law believes that Adam was sufficiently punished/deterred with a \$1000 fine, is it necessary to subject him to yet another fine? Is this system just set up to further punish the tortfeasor?

Let us now change the hypothetical a little. Adam is prosecuted for his violation of Louisiana Revised Statutes 14:40.8 but is not convicted in criminal court. He is again subject to civil action under 17:1801, and since civil court has a lower burden of proof, Adam is easily found liable and is under no constitutional limit for the exemplary damages he may have to pay. Is this how the civil law system should work?

VIII. CONCLUSION

The Senate Bill 91 and House Bill 78, also known as The Max Gruver Act, is named after 18-year-old Louisiana State University (LSU) freshman, Max Gruver, who tragically passed away from a hazing incident on campus. Before the Max Gruver Act became law, the maximum penalty for hazing in Louisiana, was 30 days in jail and a \$100 fine, and there were no exemplary damages specifically awarded for hazing violations.⁷² However, as the law stands now, the criminal penalty for hazing carries a fine of up to \$10,000 and imprisonment, with or without hard labor, for up to five years.⁷³ With the enactment of article 2315.10, the amendment of Louisiana Revised Statutes 17:1801 is referenced and 17:1801 references newly enacted Louisiana Revised Statutes 14:40.8. Therefore, through article 2315.10, can it be said that the mere punishment of defendants for hazing infractions is essentially the goal of article 2315.10? Is article 2315.10 even necessary or is it just another tool used to punish those who may or may not slip through the cracks of

72. LA. REV. STAT. ANN. § 17:1801 (2017).

73. LA. CIV. CODE ANN. Art. 2315.10, *supra* note 3.

criminal prosecution? One is inclined to believe that the answer is yes, particularly due to the fact that article 2315.10 provides that exemplary damages may be awarded “regardless of whether the defendant was prosecuted for his acts.”⁷⁴ If this assumption is credible, does the fact that *Rex Trailer Co. v. United States* is still considered “good law” support the finding that the article 2315.10, by virtue of Louisiana Revised Statutes 17:1801, is just a criminal penalty masquerading under the guise of civilian punitive damages? The answers to these questions may be revealed sometime in the near future as more civil and criminal lawsuits are filed, which essentially stemmed from the lawsuit filed by the parents of the slain LSU freshman, Max Gruver. The Gruvers’ filed a \$25 million lawsuit shortly after the enactment of the Max Gruver Act.⁷⁵

Furthermore, in February of 2019, several students from the LSU chapter of Delta Kappa Epsilon (DKE) fraternity were arrested on hazing related charges. Subsequently, the national organization of Delton Kappa Epsilon (DKE) closed its LSU chapter.⁷⁶ Since these DKE fraternity students were charged after the enactment of article 2315.10, then they might face punitive damages for their actions.

74. *Id.*

75. Associated Press, *Parents of fraternity pledge sue after son’s hazing death*, New York Post (Aug. 16, 2018), <https://perma.cc/8WFL-WUTC>.

76. Associated Press, *9 Louisiana State University fraternity members arrested on hazing-related charges*, Fox 8 Cleveland (Feb. 15, 2019), <https://perma.cc/SC4K-NZ6Z>.